BANK ISLAM MALAYSIA BHD

v.

LIM KOK HOE & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
AHMAD MAAROP JCA
[CIVIL APPEALS NOS: W-02-918-2008,
W-02-954-2008, W-02-955-2008,
W-02-957-2008, W-02-958-2008,
W-02-959-2008, W-02-960-2008,
W-02-961-2008 & W-02-962-2008]
26 AUGUST 2009
[2009] CLJ JT(4)

BANKING: *Islamic banking - Loan facility - Bai Bithaman Ajil - Validity and enforceability of - Whether far more onerous than the conventional loan with riba (interest) - Comparison between BBA contract and conventional loan agreement - Whether appropriate - Whether law applicable in BBA contract no different from law applicable in conventional loan agreement - Whether the court had a duty to defend, protect and uphold the sanctity of the contract entered into between parties*

BANKING: *Islamic banking - Loan facility - Bai Bithaman Ajil - Validity and enforceability of - Whether there was a misinterpretation of the meaning 'do not involve any element which is not approved by the Religion of Islam - Islamic Banking Act 1983, s. 2 - Whether Judges in Civil Court could rule that a matter was contrary to the religion of Islam*

WORDS & PHRASES: *'do not involve any element which is not approved by the Religion of Islam' - Meaning and purpose - Section 2, Islamic Banking Act 1983*

On 18 July 2008, the Kuala Lumpur High Court had delivered a common judgment for 12 cases concerning Islamic financing whereby the learned judge declared that the Bai Bithaman Ajil ('BBA') contract, a financial instrument in Islamic financing, was contrary to the religion of Islam. The plaintiff in the respective cases was Bank Islam Malaysia Berhad ('BIMB') and the defendants were BIMB's customers. In the common judgment, the learned judge did not deal with the particular facts of the individual cases; what the learned judge did was to discuss and

A make decisions regarding, in the learned judge's own words, "the basic principles concerning Islamic financing.'' In the event, the learned judge questioned the validity and enforceability of the BBA contract on two main grounds, namely: (i) that the BBA contract was ''far more onerous than the conventional loan with riba
B (interest)'' which was prohibited and unequivocally condemned in Islam and (ii) that the BBA contract practiced in this country was not acceptable by all the four Mazhabs in Islam. The learned judge ruled that the BBA contract was only acceptable to one Mazhab, and that was not sufficient to say that it was approved
C by the religion of Islam which was a requirement under s. 2 of the Islamic Banking Act 1983. BIMB, being adversely affected by the above rulings, filed 12 separate appeals to this court.

D **Held (allowing the appeals; setting aside High Court judgment)**

Per Raus Sharif JCA:

(1) The comparison between a BBA contract and a conventional loan agreement was not appropriate. The two instruments of
E financing are not alike and have different characteristics. BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction. The two transactions were diversely different and
F indeed diametrically opposed. Thus, the learned judge was wrong when he equated the profit earned by BIMB as being similar to 'riba' or interest. Further, the comparison between a BBA contract and a conventional loan agreement was of no relevance. It served no purpose as the law applicable in BBA
G contract was no different from the law applicable in a conventional loan agreement. The law is the law of contract and the same principle should be applied in deciding the cases herein. Thus, if the contract was not vitiated by any vitiating factor recognised in law such as fraud, coercion, undue
H influence, *etc*, the court had a duty to defend, protect and uphold the sanctity of the contract entered into between the parties. (paras 24, 25, 26 & 27)

(2) The learned judge had misinterpreted the meaning of "do not involve any element which is not approved by the Religion of
I Islam." First, under s. 2 of the Islamic Banking Act 1983, "Islamic Banking Business" does not mean banking business whose aims and operations are approved by all the four

Mazhabs. Secondly, the religion of Islam is not confined to the four Mazhabs alone as the sources of Islamic law are not limited to the opinions of the four Imams and the schools of jurisprudence named after them. Islamic Law is derived from the primary sources *ie*, the Holy Quran and the Hadith and secondary sources. There are other secondary sources of Islamic law in addition to the jurisprudence of the four Mazhabs. Judges in civil courts should not take upon themselves to declare whether a matter was in accordance with the religion of Islam or otherwise. (paras 31 & 32)

(3) Whether the bank business was in accordance with the Religion of Islam required consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. It was a requirement of any Islamic bank to establish a Syariah Advisory body to advise the bank and to ensure the operations of its banking business did not involve any element not approved by the religion of Islam. Thus, the learned Judge should not have taken upon himself to rule that the BBA contracts were contrary to the Religion of Islam without having any regard to the resolutions of the Syariah Advisory Council of the Central Bank Malaysia and the Syariah Advisory Body of BIMB on the validity of the BBA contracts. (paras 32, 34 & 35)

[Respective cases to be remitted to the High Court to be heard on their merits.]

Bahasa Malaysia *Translation Of Translation*

Pada 18 Julai 2008, Mahkamah Tinggi Kuala Lumpur telah menyampaikan satu penghakiman bersama bagi 12 kes berkenaan dengan kewangan Islam di mana yang arif hakim mengisytiharkan bahawa kontrak Bai Bithaman Ajil ('BBA'), sesuatu suratcara kewangan dalam kewangan Islam, adalah bertentangan dengan agama Islam. Plaintif dalam kes masing-masing adalah Bank Islam Malaysia Berhad ('BIMB') dan defendan-defendan merupakan pelanggan-pelanggan BIMB. Di dalam penghakiman bersama itu, yang arif hakim tidak menimbangkan fakta-fakta khusus kes-kes individu; apa yang dibuat oleh yang arif hakim ialah untuk membincangkan dan membuat keputusan mengenai, dalam kata-kata sendiri yang arif hakim, "prinsip-prinsip asas berkenaan dengan kewangan Islam." Malahan, yang arif hakim menyoal keesahan dan keboleh kuatkuasaan kontrak BBA atas dua alasan utama, iaitu:

A (i) bahawa kontrak BBA adalah "jauh lebih membebankan dari pinjaman biasa dengan riba (bunga)" yang dilarang dan jelas dikutuk dalam Islam dan (ii) bahawa kontrak BBA yang dipraktikkan dalam negara ini tidak boleh diterima oleh kesemua empat Mazhab dalam Islam. Yang arif hakim memutuskan bahawa
B kontrak BBA hanya boleh diterima oleh satu Mazhab, dan itu tidak mencukupi untuk mengatakan bahawa ia diluluskan oleh agama Islam yang merupakan satu keperluan di bawah s. 2 Akta Bank Islam 1983. BIMB, yang dijejaskan oleh perintah-perintah di atas, memfail 12 rayuan-rayuan berasingan ke mahkamah ini.

C

Diputuskan (membenarkan rayuan-rayuan; mengenepikan penghakiman Mahkamah Tinggi)
Oleh Raus Sharif HMR:

D **(1)** Perbandingan di antara suatu kontrak BBA dan suatu perjanjian pinjaman konvensional adalah tidak berpatutan. Kedua-dua suratcara kewangan tidak serupa dan mempunyai ciri-ciri berlainan. Kontrak BBA merupakan satu perjanjian jualan manakala satu perjanjian pinjaman konvensional
E merupakan sesuatu transaksi pinjaman wang. Keuntungan dalam kontrak BBA ialah berbeza dari bunga yang timbul daripada suatu transaksi pinjaman konvensional. Kedua-dua transaksi ialah berbeza dan sebenarnya bertentangan sama sekali. Oleh yang demikian, yang arif hakim khilaf apabila beliau
F menyamakan keuntungan yang didapati oleh BIMB sebagai serupa kepada 'riba' atau bunga. Tambahan lagi, perbandingan di antara suatu kontrak BBA dan suatu perjanjian pinjaman konvensional tidak relevan langsung. Ia tidak berguna kerana undang-undang yang dapat digunakan dalam kontrak BBA
G tiada perbezaan dari undang-undang yang dapat digunakan dalam suatu perjanjian pinjaman konvensional. Undang-undang itu ialah undang-undang kontrak dan prinsip yang sama sepatutnya digunakan dalam menentukan kes-kes di sini. Oleh itu, jika kontrak tidak dijadikan tak sah oleh apa-apa faktor
H ketaksahan yang diiktirafkan dalam undang-undang seperti fraud, paksaan, pengaruh tak berpatutan, dsb, mahkamah mempunyai tanggungjawab untuk membela, melindungi dan menegaskan kesucian kontrak yang dibuat di antara pihak-pihak.

I **(2)** Yang arif hakim telah menyalahtafsirkan maksud "tidak melibatkan apa-apa elemen yang tidak diluluskan oleh agama Islam." Pertamanya, di bawah s. 2 Akta Bank Islam 1983, "Pengurusan Bank Islam" tidak bermaksud pengurusan bank

yang mana tujuan dan operasinya diluluskan oleh keempat-empat Mazhab. Keduanya, agama Islam tidak terbatas kepada keempat-empat Mazhab sahaja kerana sumber-sumber undang-undang Islam tidak terhad kepada pendapat-pendapat keempat-empat Imam sahaja dan sekolah-sekolah jurisprudens yang dinamakan sempena mereka. Undang-undang Islam diperolehi daripada sumber-sumber primer, iaitu, Qur'an Suci dan Hadith dan sumber-sumber sekunder. Terdapat sumber-sumber sekunder lain undang-undang Islam di samping jurisprudens keempat-empat Mazhab. Hakim di mahkamah sivil tidak seharusnya bertindak sendiri untuk mengisytiharkan sama ada sesuatu perkara menurut agama Islam atau sebaliknya.

(3) Sama ada pengurusan bank adalah menurut agama Islam memerlukan pertimbangan oleh pakar undang-undang terkemuka yang betul-betul layak dalam bidang jurisprudens Islam. Ia adalah satu keperluan mana-mana bank Islam untuk menubuhkan suatu Perbadanan Penasihat Syariah untuk menasihatkan bank itu dan untuk memastikan operasi-operasi pengurusan bank tidak melibatkan apa-apa elemen yang tidak diluluskan oleh agama Islam. Oleh yang demikian, yang arif hakim tidak sepatutnya bertindak sendiri untuk memutuskan bahawa kontrak BBA adalah bertentangan dengan agama Islam tanpa mempedulikan ketetapan-ketetapan Majlis Penasihat Syariah Bank Pusat Malaysia dan Perbadanan Penasihat Syariah BIMB atas keesahan kontrak BBA.

[Kes masing-masing diremit ke Mahkamah Tinggi untuk dibicara atas merit-merit mereka.]

Case(s) referred to:

Affin Bank Bhd v. Zulkifli Abdullah [2006] 1 CLJ 438 HC ***(refd)***

Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd [2006] 8 CLJ 9 HC ***(refd)***

Bank Islam Malaysia Berhad v. Adnan Omar [1994] 3 CLJ 735 ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

Charter Reinsurance Co Ltd v. Fagai [1996] 3 All ER 46 ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor [2006] 1 CLJ 577 FC ***(refd)***

Datuk Hj Nik Mahmud Nik Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA ***(refd)***

M Pakiam v. YP Devathanjam [1952] MLJ 58 ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors [1982] 1 LNS 11 ***(refd)***

Wong Pa Hock v. American International Assurance Cl Ltd & Anor [2002] 2 CLJ 267 HC ***(refd)***

Legislation referred to:
Central Bank of Malaysia Act 1958, s. 16B(2)
Contracts Act 1950, s. 66
Islamic Banking Act 1983, ss. 2, 3(5)

For the appellant - Mohamed Ismail Shariff (Oommen Koshy & Mohd Arief Emran with him); M/s Skrine
For the 1st respondent - Richard Bong (Aidarahayu with him); M/s Bong & Co
For the 3rd respondent - In person
For the 4th respondent - In person
For the 5th respondent - Absent; M/s Abdul Aziz & Assocs
For the 6th respondent - Syed Shafiq Alhabshi (Stanislaus with him); M/s MS Vethanayagam & Assocs
For the 7th respondent - Harpal Singh Grewal (Harwinder Kaur with him); M/s AJ Arififn Yeo & Harpal
For the 8th respondent - In person
For the 9th respondent - In person
For the 10th respondent - In person

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif JCA:

Introduction

[1] On 18 July 2008, the Kuala Lumpur High Court delivered a common judgment for 12 cases concerning Islamic financing which sent shock waves to the Islamic banking industry. The learned judge declared that the Bai Bithaman Ajil ("BBA") contract, a financial instrument in Islamic financing, which had been in existence and practised in this country for the past 25 years was contrary to the Religion of Islam.

[2] The plaintiff in the respective 12 cases was Bank Islam Malaysia Berhad ("BIMB"). BIMB is an Islamic bank licensed under the Islamic Banking Act 1983 and thus authorised to carry on Islamic banking business. The defendants were BIMB's customers.

[3] What had happened was this. Prior to the delivering of the common judgment, the learned judge had instructed counsel appearing in the 12 cases which were pending before him, to file their respective written submissions.

[4] The written submissions were duly filed but counsel were not called upon to appear before the learned judge to make oral submissions or provide clarification of their written submissions. From the written submissions the common judgment for the 12 cases was delivered by the learned judge.

[5] In the common judgment, the learned judge did not deal with the particular facts of the individual cases. What he had done was to discuss and make decisions regarding, in the learned judge's own words 'the basic principles concerning Islamic financing'. At the end of it, he concluded that the BBA contracts were contrary to basic principles of Islam.

[6] In his ruling, the learned judge had grouped the BBA contracts into two categories: those where there was a novation agreement and those where there was none. In those where there was a novation agreement he further subdivided it with two sub-categories: those where the financing had expired and those where it is still ongoing. For those where the financing period had expired, the claim by BIMB was allowed in full. For those where the financing period is still ongoing and had not expired, he ruled that the amount claim was excessive and unfair. He applied the 'equitable' interpretation of the sale price as he had interpreted in his earlier judgment in the case of *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438.

[7] What had happened in *Affin Bank Bhd. v. Zulkifli Abdullah (supra)* was this. Zulkifli Abdullah obtained a secured housing loan of RM394,172.06 from the Affin Bank Bhd under the BBA in 1997. Zulkifli Abdullah defaulted the loan in 2002 after paying RM33,454.19 to the bank. Affin Bank Bhd then claimed from Zulkifli Abdullah the full sale price of RM958,909.21, inclusive of the plaintiff's profit margin for the full term of the loan. Affin Bank Bhd also applied for an order for sale of the changed property. Zulkifli however challenged the amount claimed. The learned judge held:

(1) If the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure. To allow the bank to also be able to earn for the unexpired tenure of the facility, means the bank is able to earn a profit twice upon the same sum at the same time.

(2) The profit margin that continued to be charged on the unexpired part of the tenure cannot be actual profit. It was clearly unearned profit. It contradicted the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider was entitled to. Obviously, if the profit had not been earned it was not profit, and should not be claimed under the Al-Bai Bithaman Ajil facility.

(3) The profit margin could be calculated and derived with certainty. Even if the tenure was shortened, the profit margin could be recalculated with equal certainty. The total due on the date of the judgment was RM616,080.99 and after crediting the defendant with all the payments he has made of RM33,454.19, the balance due on the date of judgment was RM582,626.80.

(4) Once it was established that there had been a default, then unless there was cause to the contrary, the order for sale must be given since a charge is an *ad rem* right to dispose of the security to recover a secured debt.

[8] The learned judge then proceeded to determine the actual amount due to the plaintiff in the following manner:

> Balance Due 29 December 2005
>
> According to the calculation placed before the court for the bank, the bank profit at the agreed profit rate of 9% per annum on RM394,172.06 is RM35,475.49 per annum or RM35,475.49/12 = RM2,956.29 per month or on a 360 day 20 year basis as agreed, RM98.54 per day. Between 1 November 1999 to the date of judgment on 29 December 2005 is a period of 74 months less 2 days. The profit, by simple arithmetic since the payments meantime is not very significant, for 74 months less 2 days is RM218,767.49. As agreed the bank is also entitled to penalty of RM3,141.44 as on today. Added to the bank purchase price of RM349,172.06 the total due on the date of judgment is RM616,080.99. After crediting the defendant with all the payments he had made RM33,454.19, the balance due on the date of judgment is RM582,626.80. The bank is also entitled to profit per day here after full payment at RM2,956/30 = RM98.54.

[9] It can be seen from the case cited above that an Islamic bank could only recover the balance of the principal of the facility plus profit on the balance principal calculated at a daily rate until payment.

[10] The learned judge further ruled that for those contracts, where there was no novation agreement, the agreement was in fact a loan agreement. And, since interest is prohibited in Islam, BIMB could only recover the principal sum advanced pursuant to s. 66 of the Contracts Act 1950.

Appeals

[11] BIMB, being adversely affected by the above rulings, filed 12 separate appeals to this court. On 31 March 2009, we heard nine out of the 12 appeals. The nine appeals were:

(i) Civil Appeal No: W-02-918-2008

Bank Islam Malaysia Berhad ... Appellant

And

1. Lim Kok Hoe
2. Koh Hsia Ping (F) ... Respondents

(ii) Civil Appeal No: W-02-954-2008

Bank Islam Malaysia Berhad ... Appellant

And

1. Mohd Razmi bin A. Rahman
2. Wan Hazlina binti Wan Mohd Ali ... Respondents

(iii) Civil Appeal No: W-02-955-2008

Bank Islam Malaysia Berhad ... Appellant

And

1. Baharom bin Harun
2. Rohynoon bt Mohd Yussof ... Respondents

(iv) Civil Appeal No: W-02-957-2008

Bank Islam Malaysia Berhad ... Appellant

And

1. Ghazali bin Shamsuddin
2. Mokhtar bin Shamsudin
3. Kamarudin bin Samsudin ... Respondents

(v) Civil Appeal No: W-02-958-2008

Bank Islam Malaysia Berhad ... Appellant

And

1. Peringkat Raya (M) Sdn Bhd
2. Mohamed Kamal bin Hussain ... Respondents

(vi) Civil Appeal No: W-02-959-2008

Bank Islam Malaysia Berhad ... Appellant

And

Nordin bin Suboh ... Respondent

(vii) Civil Appeal No: W-02-960-2008

Bank Islam Malaysia Berhad ... Appellant

And

1. Zawawi bin Osman
2. Maznon binti Mohd Sidin ... Respondents

(viii) Civil Appeal No: W-02-961-2008

Bank Islam Malaysia Berhad ... Appellant

And

Widyawati binti Mohd Nor ... Respondent

(ix) Civil Appeal No: W-02-962-2008

Bank Islam Malaysia Berhad ... Appellant

And

Noor Azlina bt Baharom ... Respondent

Issues And Findings

[12] After hearing the parties, we unanimously allowed the BIMB's respective appeals. We now give our reasons.

[13] The nine appeals involved BBA contracts. Thus, in order to understand the decision and reasoning of the learned judge, it is necessary to set out briefly the nature and essential features of a BBA contract.

[14] A BBA contract is a financial instrument in Islamic banking. It is the most common form of transaction being used in Islamic banking in this country. Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a Property Purchase Agreement and also a Property Sale Agreement.

[15] In a typical BBA contract, the customer will first sell the property or asset to the bank under the Property Purchase Agreement. The bank's purchase price would be the amount required by the customer. That sum is called the facility amount or the financing amount. It is also described as the bank's purchase price.

[16] The sale is a cash sale. The bank has to pay the purchase price to the customer immediately upon the completion of the documentation process. But in most cases, where a customer had entered into a Sale and purchase agreement with a developer to purchase a house, and therefore needs financing, the bank and the customer would mutually agree that the bank shall release the amount (the bank's purchase price) to the developer in stages against progress payment certificates.

[17] With that purchase, the property belongs to the bank. But, the customer is to buy it back from the bank and he will only be able to pay the price over a period of years. The bank will sell but the sale price will not be the same amount as the bank's purchase price. The sale price will include the bank's profit on the sale, which will later be calculated and added to the purchase price. The total amount is now the sale price. In effect, the bank will sell the very same property it has purchased from the customer to him at a selling price under the Property Sale Agreement. The customer then will pay the bank's selling price over a period of years by monthly installments. At that point the customer becomes the owner of the property again.

[18] To illustrate the BBA contract, we will refer to the facts in Civil Appeal No. W-02-918-2008. In that case the customer applied to BIMB for a financing facility to purchase a property known as Unit B10-3 Jenis Excelsa, Taman Universiti Indah, Fasa 111C ("the property"). BIMB purchased the property from the customer pursuant to a Property Purchase Agreement dated 16 October 1996 for a purchase price of RM145,800. On the same date BIMB sold the property to the customer pursuant to a Property Sale Agreement for a sale price of RM450,954. Again on the same date, the customer executed a deed of assignment in favour of the BIMB to secure the payment of the sale price. The sale price was to be paid by the customer by 360 monthly instalments of RM1,252.65 per month. The customer had paid the sum of RM105,556.13 before he defaulted in the payment of the sale price. The balance sale price due was the sum of RM370,425.05. That was the sum claimed by BIMB from the customer.

[19] The above illustration clearly demonstrates that in a BBA contract the sales took place immediately both pursuant to the Property Purchase Agreement and the Property Sale Agreement, so that when the Property Sale Agreement was entered into, the customer becomes the owner of the property immediately. What was deferred was the payment of the BIMB's selling price by the customer to the BIMB.

[20] The above illustration also demonstrates that in BBA contract, the Property Purchase Agreement and the Property Sale Agreement completed the BBA transaction. But, invariably the bank will require security from the customer for the payment of the bank's selling price. If a separate title to the property has been issued, the customer will create a charge in favour of the bank. If a separate title has not been issued, the customer will execute a deed of assignment by way of security. However, it should be noted that the charge or assignment is not part of the BBA transaction. It is a security arrangement. Even without the charge or assignment the BBA contract will be completed.

[21] The learned judge in his common judgment questioned the validity and enforceability of the BBA contracts on two main grounds. First, he found the BBA contract was 'far more onerous than the conventional loan with riba' which is prohibited and unequivocally condemned in Islam. Second, he found that the

BBA contract practised in this country is not acceptable by all the 4 Mazhabs in Islam. He ruled that BBA contract is only acceptable to one Mazhab, and this is not sufficient to say that it is approved by the Religion of Islam which is a requirement under s. 2 of the Islamic Banking Act 1983.

BBA Contract 'Far More Onerous Than The Conventional Loan With Riba'

[22] The learned judge in advancing his view that the BBA contract is 'far more onerous than the conventional loan with riba', used the facts in *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735 (Adnan bin Omar), as the starting point. In that case, the bank was also BIMB, had granted the customer a facility amounted to RM583,000. It involved three simultaneous transactions, namely:

(i) On 2 March 1984, the customer sold to BIMB a price of land for RM265,000 which sum was duly paid to him;

(ii) On the same date, BIMB resold the same piece of land to the customer for RM583,000 which amount was to be paid by the customer in 180 monthly installments;

(iii) Also on the same date, the said land was charged to BIMB by the customer as security for the debt of RM583,000.

[23] Using the facts in *Adnan bin Omar*, the learned judge concluded by stating that the customer 'who had sought and obtained an Islamic financing facility of RM265,000 ended up, when he defaulted not long after, with liability of RM583,000. This, according to the learned judge had resulted in the customer being liable to an amount far higher than he would have been liable to in a conventional loan with interest. He then pointed out that if a conventional loan must be avoided because of the prohibition of "riba" or interest, surely the alternative must result in a consequence that is less burdensome than a default in the conventional loan with prohibited interest. He continued in the following words:

> But it is equally evident in this case that the result of what is presented as the application of the Quran principle is that the defendant became liable, upon default at any time, to an amount that is 2.2 times the facility he obtained. It could hardly have been intended by these words in the Surah Al-Baqarah that an Islamic

financing facility should result in consequences for more onerous than the conventional loan with "riba" that is prohibited and unequivocally condemned. One might pause and observe that the harshness of usury is hardest upon those who default, and much less so, if at all, upon those fortunate enough to be able to service the loan successfully. The Qur'an could hardly have intended that its followers, faithfully and trustingly seeking an Islamic compliant facility, should be delivered to those who offer what appear to be perfectly Islamic compliant facilities, but upon a default, had an interpretation applied that imposes a far more onerous liability than the conventional loan with interest. It is difficult to conceive that the Religion of Islam intended to discourage its followers from the conventional loan with interest, condemn lenders for such loans, and deliver its followers into the bands of banks and financiers who under sale agreements with deferred payments, exact upon default, payments far exceeding the liability upon default of a conventional loan with interest. One cannot say that the Religion of Islam is so much more concerned with form than substance as would sustain the bank's interpretation of "selling price".

[24] We have no hesitation in accepting that riba' or interest is prohibited in Islam. But the issue at hand is whether such comparison between a BBA contract and conventional loan agreement was appropriate. With respect, we do not think so. This is because the two instruments of financing are not alike and have different characteristics. BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction. The two transactions are diversely different and indeed diametrically opposed.

[25] Thus, the learned judge was plainly wrong when he equated the profit earned by BIMB as being similar to riba' or interest. The two cannot be similar as BBA contract is in fact a trade transaction. It is a transaction between the customer and the bank. In such transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank.

[26] Further, the comparison between BBA contract and conventional loan agreement is of no relevance. It serves no purpose as the law applicable in BBA contract is no different from the law that is applicable in a conventional loan agreement. Abdul Hamid JCA (as he then was) in the case of *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625, dealing with Islamic banking facility said:

> As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under the conventional banking.
>
> The charge is a charge under the National Land Code. The remedy available and sought is a remedy under the National Land Code. The procedure is provided by the Code and Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.

[27] Similarly, the law applicable to BBA contracts is no different from the law applicable to loan given under the conventional banking. The law is the law of contract and the same principle should be applied in deciding these cases. Thus, if the contract is not vitiated by any vitiating factor recognised in law such as fraud, coercion, undue influence, etc. the court has a duty to defend, protect and uphold the sanctity of the contract entered into between the parties.

[28] Thus, the learned judge in coming to the conclusion that BBA contract is in fact a loan agreement and consequently by:

(a) replacing the sale price under the Property Purchase Agreement with an "equitable interpretation" of the same; and

(b) substituting the obligation of customer to pay the sale price with a "loan amount" and "profit" computed on a daily basis,

as he expounded in *Affin Bank Bhd. v. Zulkifli Abdullah (supra)*, was in fact rewriting the contract for the parties. It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable. This principles has been clearly expressed in numerous cases. (See *Shell Malaysia Trading Sdn. Bhd. v. Lim Yee Teck & Ors* [1982] 1 LNS 11; *Wong Pa Hock v. American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267; *M. Pakiam v. YP Devathanjam* [1952] MLJ 58; and *Charter Reinsurance Co. Ltd. v. Fagai* [1996] 3 All ER 46.

BBA Contract Not Acceptable By All The Four Mazhabs And Thus Not Acceptable In The Religion Of Islam

[29] The learned judge acknowledged the fact that cases involving Islamic financing in this country remain within the Federal Legislative jurisdiction, and such cases are brought in the Civil

Courts and not the Syariah Courts. He also acknowledged that no legislation in the form of Islamic laws has been legislated for trade and financing based upon Islamic principles. But the learned judge took issue on the definition of 'Islamic banking business' in s. 2 of the Islamic Banking Act 1983 which reads:

> 'Islamic banking business' means banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam.

[30] The learned judge in interpreting the above definition stated as follows:

> If a facility is to be offered as Islamic to Muslims generally, regardless of their mazhab, then the test to be applied by a civil court must logically be that there is no element not approved by the Religion of Islam under the interpretation of any of the recognised mazhabs. That it is acceptable to one mazhab is not sufficient to say it is acceptable in the Religion of Islam when it is not accepted by the other mazhabs.

[31] With utmost respect, the learned judge had misinterpreted the meaning of "do not involve any element which is not approved by the Religion of Islam". First, under s. 2 of the Islamic Banking Act 1983, "Islamic banking business" does not mean banking business whose aims and operations are approved by all the four mazhabs. Secondly, we do not think the Religion of Islam is confined to the four mazhabs alone as the sources of Islamic law are not limited to the opinions of the four imams and the schools of jurisprudence named after them. As we all know, Islamic law is derived from the primary sources ie, the Holy Quran and the Hadith and secondary sources. There are other secondary sources of Islamic law in addition to the jurisprudence of the four mazhabs.

[32] In this respect, it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise. As rightly pointed out by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulamak take years to comprehend'. Thus, whether the bank business is in accordance with the Religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.

[33] This issue is in fact addressed in the Islamic Banking Act 1983. To ensure that the operation of the banking business of an Islamic bank is in accordance to the Religion of Islam, s. 3(5) provides that the Central Bank ie, the Bank Negara Malaysia shall not to recommend the grant of an Islamic banking licence, and the Minister shall not to grant a licence, unless he is satisfied:

> (b) that there is, in the articles of association of the bank concerned, provision for the establishment of a Syariah advisory body to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the Religion of Islam.

[34] Thus, it is a requirement for any Islamic bank to establish a Syariah advisory body to advise the bank and to ensure the operations of its banking business do not involve any element which is not approved by the Religion of Islam. In fact, in 2003, a single Syariah Advisory Council was established through an amendment of the Central Banking of Malaysia Act 1958. Section 16B of the Central Bank of Malaysia Act 1958 established the central Syariah Advisory Council under the aegis of Bank Negara Malaysia. With the amendment, the single Syariah Advisory Council became "the authority for the ascertainment of Islamic law for the purpose of Islamic banking business, takaful business, Islamic financing business, Islamic development financial business or any other business which is based on Syariah principles". Section 16B(2) of the Act provides for the membership of the Syariah Advisory Council. With the establishment of the single Syariah Advisory Council, the Islamic Banking Act 1983, had been amended accordingly. It provides as follows:

> **Advice of Syariah Advisory Council**
>
> 13A(1) An Islamic bank may seek the advice of the Syariah Advisory Council on Syariah matters relating to its banking business and the Islamic bank shall comply with the advice of the Syariah Advisory Council.
>
> (2) In this section, "Syariah Advisory Council" means the Syariah Advisory Council established under sub-section 16B(1) of the Central Bank of Malaysia Act 1958.

[35] Thus, we already have the legal infrastructure to ensure that the Islamic banking undertaken by the banks in this country does not involve any element which is not approved by the Religion of Islam. The court, will have to assume that the Syariah advisory

body of the individual bank and now the Syariah Advisory Council under the aegis of Bank Negara Malaysia, would have discharge their statutory duty to ensure that the operation of the Islamic banks are within the ambit of the Religion of Islam. This is more so, when the customers in these appeals have not made any allegations that the Syariah advisory body of BIMB or the Syariah Advisory Council established by the Bank Negara had failed to exercise their statutory duties. Thus, the learned judge, with respect, should not have taken upon himself to rule that the BBA contracts were contrary to the Religion of Islam without having any regard to the resolutions of the Syariah Advisory Council of the Central Bank Malaysia and the Syariah Advisory body of BIMB on the validity of BBA contracts.

[36] In any event, the questions raised by the learned judge on the validity and enforceability of the BBA contracts, is not novel. It had been raised in previous cases and had been ruled upon. In *Adnan bin Omar v. Bank Islam Malaysia Berhad* (unreported), the Supreme Court upheld the validity and enforceability of the BBA contract. In that case, the Supreme Court accepted as correct and affirmed the judgment of Ranita Hussein JC. Subsequently, the validity and the enforceability of BBA contracts was again decided by this court in *Datuk Hj. Nik Mahmud Nik Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605, and *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn Bhd (supra)*.

[37] In *Dato' Hj. Nik Mahmud Nik Daud*, the customer argued that the Property Purchase Agreement and the Property Sale Agreement and the land charges based on them were null and void. Both the High Court and the Court of Appeal disagreed with the contention and granted the order of sale for the full outstanding balance of the bank's selling price. In *Emcee Corporation Sdn. Bhd.*, the validity and enforceability of the BBA contract was again challenged. The High Court at Seremban refused to grant the order for sale on the construction of a term in the agreement. On appeal, the Court of Appeal reversed the judgment of the High Court and granted the order. An application for leave to appeal to the Federal Court by the customer was refused by the Federal Court.

[38] From the above cases, it is clear that the validity and enforceability of the BBA contract had been ruled upon by the superior courts. It is trite law that based on the doctrine of *stare decisis*, a decision of a superior court is binding on all courts below

it. The importance of this principle must not be taken lightly. In this regard, we can do no better than be guided by the wise words of Steve Shim CJ (Sabah & Sarawak) in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577:

> It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained to status of immutability.

His Lordship further stated that:

> Judicial hierarchy must be observed in the interest of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.

[39] In light of the above the learned judge ought to have held himself bound by those decisions. He cannot simply ignore or disregard the decisions of the Supreme Court or the Court of Appeal. To do so, as pointed by Steve Shim CJ (Sabah & Sarawak) would create chaos and misapprehensions in the judicial system.

[40] In conclusion, it is our view that the High Court judgment was manifestly wrong and must be set-aside. Accordingly, we allowed the nine appeals with costs here and the court below. The orders of the learned judge are therefore set-aside. We ordered the respective cases to be sent back to the High Court to be heard on its merit. We also order that the deposits of these appeals are to be refunded to BIMB.